Tommy ak Tebi (M) v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05–345 OF 2010
ABDUL WAHAB PATAIL, ZAHARAH IBRAHIM AND MOHD ARIFF JJCA
3 MAY 2013

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Criminal Law — Penal Code — s 302 — Murder — Defence of insanity — Accused claimed to have schizophrenia and heard voices during commission of crime — Accused convicted of charge and sentenced to death — Whether accused was of sound mind during commission of crime — Whether accused established defence of insanity on balance of probabilities — Penal Code ss 84 & 302

D

Criminal Procedure — Defence — Insanity — Accused convicted of charge and sentenced to death — Whether accused was of sound mind during commission of crime — Whether defence of insanity under s 84 of the Penal Code proven — Penal Code ss 84 & 302

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In the High Court, the appellant was convicted for the charge of murder, an offence under s 302 of the Penal Code ('Code') and was subsequently sentenced to death. The appellant had stabbed one Gedik ak Usit ('the deceased') in a public toilet, using a knife. A post mortem examination on the deceased revealed that the cause of her death was due to four stab wounds on her back. The appellant was arrested based on information given by PW4 that the deceased had informed her that 'Tommy' ('the appellant') had wanted to kill her. Another witness, PW8, also testified that the deceased was afraid of Tommy. During his arrest, the appellant's jeans were found to have a spot of blood on them and a DNA analysis conducted on the blood showed that it belonged to the deceased. In his defence, the appellant pleaded insanity and claimed to have heard voices while committing the murder. The appellant contended that he had been diagnosed with schizophrenia and had to take medicine but during the commission of the murder, he had not taken his medicine for two months and was under the influence of alcohol. The appellant's claim was supported by the medical evidence of DW2, who gave evidence that hearing voices and hallucination would be symptoms of schizophrenia and this would be worsened by consumption of alcohol. However, according to DW2, the psychiatrists who treated the appellant after the accident concluded that the appellant was sane at the time of the incident. In the present appeal against his conviction and sentence, the appellant submitted that the learned judicial commissioner ('JC') was wrong when he made a finding that the appellant was sane and/or had failed to prove the

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defence of insanity under s 84 of the Penal Code when the evidence showed that he was of unsound mind during the commission of the act.

Held, dismissing the appeal:

(1) The evidence of DW2, while corroborative of the appellant's story that he had been under treatment for schizophrenia since 1993, did not support the appellant's defence that he was of unsound mind at the time of the commission of the act causing the death of the deceased. DW2 gave evidence, based on the records at the hospital, that the appellant had consistently told the various doctors who had attended to him soon after the incident that he did not hear any voices. The psychiatrists who had attended to the appellant soon after the incident also formed the opinion that he did not have a relapse of his illness; was sane at the time of the incident; and was capable of knowing the nature of the act and that the act was wrong or contrary to law (see paras 21–23).

(2) The learned JC arrived at the correct decision in holding that the appellant had failed to prove, on the balance of probabilities, that by reason of unsoundness of mind, he was incapable of knowing the nature of the act he committed in stabbing the deceased and thus causing her death, or that what he did was either wrong in law or contrary to law (see para 27).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, perayu disabitkan dengan tuduhan membunuh, kesalahan di bawah s 302 Kanun Keseksaan ('Kanun') dan kemudiannya dijatuhkan hukuman mati. Perayu telah menikam seorang yang bernama Gedik ak Usit ('si mati') di bilik air awam, menggunakan pisau. Pemeriksaan post mortem ke atas si mati menunjukkan bahawa punca kematiannya adalah akibat empat luka tikaman di belakangnya. Perayu ditangkap berdasarkan maklumat yang diberikan oleh PW4 bahawa si mati memberitahunya yang 'Tommy' (perayu) hendak membunuh dia. Saksi satu lagi, PW8, juga memberi keterangan bahawa si mati takut kepada Tommy. Semasa penangkapannya, seluar jeans perayu didapati mempunyai tompok darah di atasnya dan analisa DNA yang dilakukan ke atas darah menunjukkan ia milik si mati. Dalam pembelaannya, perayu memplid hilang akal dan mendakwa telah mendengar suara semasa melakukan pembunuhan tersebut. Perayu berhujah bahawa dia telah didiagnosis dengan penyakit schizophrenia dan terpaksa mengambil ubat tetapi semasa melakukan pembunuhan tersebut, dia tidak mengambil ubatnya selama dua bulan dan di bawah pengaruh alkohol. Dakwaan perayu disokong oleh keterangan DW2, yang memberi keterangan bahawa mendengar suara dan halusinasi adalah tanda penyakit schizophrenia dan ini akan menjadi lebih teruk dengan alkohol. Walau bagaimanapun, mengikut DW2, psikiatri-psikiatri yang merawat perayu selepas kejadian tersebut memutuskan yang perayu adalah waras pada ketika kejadian tersebut. Dalam rayuan ini

terhadap sabitan dan hukumannya, perayu berhujah bahawa pesuruhjaya kehakiman ('PK') yang bijaksana adalah salah apabila beliau membuat dapatan bahawa perayu adalah waras dan/atau telah gagal untuk membuktikan pembelaan hilang akal di bawah s 84 Kanun Keseksaan apabila keterangan menunjukkan bahawa dia tak sempurna akal semasa melakukan tindakan tersebut.

Diputuskan, menolak rayuan:

(1) Keterangan DW2, sementara menyokong cerita perayu bahawa dia telah dirawat untuk penyakit schizophrenia semenjak 1993, tidak menyokong pembelaan perayu bahawa dia tak sempurna akal pada masa melakukan tindakan menyebabkan kematian si mati. DW2 memberi keterangan, berdasarkan rekod-rekod hospital, bahawa perayu telah dengan konsisten memberitahu beberapa doktor yang merawat dia selepas kejadian tersebut yang dia tidak mendengar apa-apa suara. Psikiatri-psikiatri yang merawat perayu selepas sahaja kejadian tersebut juga membentuk pandangan bahawa dia tidak kambuh penyakitnya; waras pada ketika kejadian tersebut; dan dapat mengetahui sifat tindakan dan bahawa tindakan tersebut adalah salah atau betentangan undang-undang (lihat perenggan 21–23).

(2) PK yang bijaksana mencapai kepada keputusan yang betul dalam memutuskan bahawa perayu telah gagal untuk membuktikan atas imbangan kebarangkalian, bahawa atas sebab tak sempurna akal, dia tidak dapat mengetahui sifat tindakan yang dilakukannya menikam si mati dan oleh itu menyebabkan kematiannya, atau apa yang dia lakukan olehnya sama ada salah di sisi undang-undang atau bertentangan undang-undang (lihat perenggan 27).]

Notes

For cases on s 302 of the Penal Code, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1815–1931.

For cases on insanity, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1926–1930.

Cases referred to

John a/l Nyumbei v PP [2007] 7 MLJ 206, CA (refd)

Mohamed Isa bin Leman v PP [1939] 1 MLJ 160, CA (refd)

PP v Alang Mat Nasir bin Anjang Talib; PP v Chen Lip [1938] 1 MLJ 153; [1938] 1 LNS 1 (refd)

PP v Muhammad Suhaimi Abdul Aziz [2005] 2 CLJ 826, FC (refd)

PP v Muhammad Suhaimi Abdul Aziz [2004] 1 CLJ 378, CA (refd)

PP v Zainal Abidin bin Mohd Zaid [1993] 1 CLJ 147, HC (refd)

Legislation referred to
Evidence Act 1950 s 105
Penal Code ss 84, 302

Appeal from: Criminal Trial No 45–3 of 2009 III (SG) (High Court, Sarawak)

Abdul Rahman bin Mohamad Hazmi for the appellant.
Musli bin Ab Hamid (Deputy Public Prosecutor) for the respondent.

Zaharah Ibrahim JCA (delivering judgment of the court):

INTRODUCTION

[1] This is the appellant's appeal against the decision of the High Court of Sabah and Sarawak at Sri Aman, Sarawak, which convicted the appellant of the charge against him for the offence of murder under s 302 of the Penal Code. The appellant was sentenced to death and ordered to be hanged by the neck until he is dead.

THE CHARGE

[2] The charge against the appellant was as follows:

> Bahawa kamu Tommy anak Tebi (KPT: 600906-13-5323) pada 4.04.2009 jam lebih kurang 0500 pagi di Tandas Awam, Pasar Tamu di Daerah Sri Aman, di dalam Negeri Sarawak, telah membunuh Gedik Anak Usit (461231-13-7568) dengan menggunakan sebilah pisau dan dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

EVIDENCE ADDUCED FOR THE PROSECUTION

[3] The evidence adduced during the case for the prosecution was that at 5am on 4 April 2009, the deceased was found already dead in a pool of blood on the floor of the public toilet next to the Sri Aman market.

[4] The pathologist who conducted the post-mortem examination on the body of the deceased concluded that she died as a result of four stab wounds on her back.

[5] The appellant was arrested on 5 April 2009 from information given by PW4 that the deceased had informed her that 'Tommy' had wanted to kill her.

[6] When the appellant was arrested, his jeans were found to have a spot of

blood on them. DNA analysis was conducted on the blood and the results showed that the DNA profile of that blood matched the DNA profile of the deceased.

[7] Apart from PW4, another witness, PW8, also testified that the deceased was afraid of 'Tommy'.

[8] Although 'Tommy' was never pointed out to PW4 or PW8 by the deceased, the evidence by the witnesses for the prosecution showed that 'Tommy' must refer to the appellant.

DECISION AT THE CONCLUSION OF THE CASE FOR THE PROSECUTION

[9] At the conclusion of the case for the prosecution, the learned judicial commissioner found that the prosecution had proved a prima facie case against the appellant and the appellant was called to enter his defence on the charge against him.

DEFENCE

[10] The appellant chose to give evidence under affirmation ('on oath').

[11] The appellant's defence was one of insanity. He claimed to hear voices if he did not take his medicine and he would not be in control of himself. He claimed to have been diagnosed with schizophrenia in 1993 and had to take medicine. However, at the time of the incident he had not been taking his medicine for two months. He also claimed to have been under the influence of alcohol at the time of the incident, and that he heard 'voices'.

[12] The appellant's claim of suffering from schizophrenia was corroborated by the evidence of DW2, who also gave evidence that hearing voices and hallucination would be symptoms of schizophrenia. DW2 also testified that if a person with schizophrenia consumed alcohol, the alcohol would make him uninhibited and he would be less able to control his behaviour.

[13] However, DW2 also gave evidence that the medical records of the appellant at Hospital Sentosa ('the hospital'), where the appellant had been treated since 1992 and where he was admitted two weeks after the incident and treated by two psychiatrists, disclosed that the psychiatrists concluded that the appellant was not in a state of relapse and did not hear voices and was sane at

the time of the incident.

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DECISION AT THE CONCLUSION OF THE TRIAL

[14] At the end of the whole case, the learned judicial commissioner concluded that the prosecution had proved the charge against the appellant beyond reasonable doubt and convicted him of that charge. He was sentenced to death as provided for under s 302 of the Penal Code.

GROUND OF APPEAL

[15] The sole ground put forth in the appellant's petition of appeal against his conviction and sentence is that the learned judicial commissioner in the trial court was wrong when he made a finding that the appellant was sane and/or had failed to prove the defence of insanity under section 84 of the Penal Code when the evidence showed that at the time he did the act he was of unsound mind.

DECISION

The law

Defence of unsoundness of mind

[16] The defence raised by the appellant was one under s 84 of the Penal Code, which reads as follows:

> 84. Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong in law or contrary to law.

Burden of proof

[17] As the defence raised by the appellant was the defence of insanity under s 84 of the Penal Code, s 105 of the Evidence Act 1950 applies. Section 105 of the Evidence Act 1950 provides as follows:

> 105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.
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> ILLUSTRATIONS
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> (a) A accused of murder alleges that by reason of unsoundness of mind he did not know the nature of the act.
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> The burden of proof is on A.
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> …

[18] As to the quantum or degree of proof required of an accused raising the defence of unsoundness of mind or insanity, it is now settled law that it is on the balance of probabilities. This is clear from cases decided by the FMS. Court of Appeal as long ago as *Public Prosecutor v Alang Mat Nasir bin Anjang Talib; Public Prosecutor v Chen Lip* [1938] 1 MLJ 153; [1938] 1 LNS 1 and *Mohamed Isa bin Leman v Public Prosecutor* [1939] 1 MLJ 160 and by the Federal Court as recent as *Public Prosecutor v Muhammad Suhaimi Abdul Aziz* [2005] 2 CLJ 826, as well as those cited and followed by the learned judicial commissioner.

[19] To bring himself within the defence in s 84 of the Penal Code, the

A appellant must first prove, on the balance of probabilities, that he was of unsound mind. He must then prove that because of that unsoundness of mind he was incapable of knowing the nature of the act or that what he did was either wrong or contrary to law. Only if he could prove both would he be able to take advantage of the defence of legal insanity as provided for in s 84 of the Penal B Code.

Evaluation of the High Court decision

C **[20]** The learned judicial commissioner dealt with the difference between legal insanity and medical insanity by reference to cases such as *Public Prosecutor v Zainal Abidin bin Mohd Zaid* [1993] 1 CLJ 147, *John a/l Nyumbei v Public Prosecutor* [2007] 7 MLJ 206 and *Public Prosecutor v Muhammad Suhaimi Abdul Aziz* [2004] 1 CLJ 378, and correctly, in our view, applied the D test of legal insanity in evaluating the appellant's defence of insanity.

[21] The evidence of DW2, while corroborative of the appellant's story that he had been under treatment for schizophrenia since 1993, did not support the E appellant's defence that he was of unsound mind at the time of the commission of the act causing the death of the deceased.

[22] DW2 gave evidence, based on the records at the hospital, that the appellant had consistently told the various doctors who had attended to him F soon after the incident that he did NOT hear any voices. The psychiatrists who had attended to the appellant soon after the incident also formed the opinion that he did not have a relapse of his illness.

[23] DW2 also gave evidence that the psychiatrists who had attended to the G appellant soon after the incident and had been observing him at the hospital concluded that the appellant was sane at the time of the incident and was capable of knowing the nature of the act and that the act was wrong or contrary to law.

H **[24]** We note that the appellant was asked during examination-in-chief 'When you stabbed somebody would it not kill her?' His answer was 'Yes. I thought she did not die until people told me so'. The appellant clearly knew the nature of his act despite his denial of an intention to kill the deceased.

I **[25]** We have carefully perused the learned judicial commissioner's grounds and the evidence of the appellant and DW2 and we are satisfied that the learned judicial commissioner did not err in coming to his conclusion that the appellant was NOT of unsound mind when he stabbed the deceased.

[26] In our view, the learned judicial commissioner also did not err when His Lordship concluded that the appellant knew the nature of his act and knew that it was wrong or contrary to law.

CONCLUSION

[27] We are therefore satisfied that the learned judicial commissioner arrived at the correct decision when His Lordship held that the appellant had failed to prove, on the balance of probabilities, that by reason of unsoundness of mind, he was incapable of knowing the nature of the act he committed in stabbing the deceased and thus causing her death, or that what he did was either wrong in law or contrary to law.

[28] We therefore dismiss the appeal by the appellant and affirm his conviction and sentence.

Appeal dismissed.

Reported by Afiq Mohamad Noor